



FINANCIAL ASSISTANCE LETTER

This Financial Assistance Letter is issued under the authority of the Senior Procurement Executives of DOE and NNSA

Subject: Implementation of Division D, Title III and Title V, and Division E, Title VII of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113.

References:

Consolidated Appropriations Act,
2016, Pub. L. No. 114-113

Division D, Title III, Sections
301(a), 301(c), 306, and 307,
and Title V, Section 501;
Division E, Title VII, Sections
724, 739, 743, 744, 745 and
746.

When is this Financial Assistance Letter (FAL) effective?

The statutory provisions addressed in this FAL were effective as of the enactment date of the Consolidated Appropriations Act, 2016, enacted December 18, 2015.

When does this FAL expire?

This FAL is in effect for FY16. This FAL and all previous FALs on appropriations will be archived after a new FAL on appropriations is issued. Generally, the guidance provided in the appropriation FALs will remain in effect when obligating dollars appropriated under that applicable appropriation Act's FAL. Please request assistance from your local counsel for applicability after the end of an FY.

Who is the point of contact?

For DOE, contact Richard Bonnell of the Contract and Financial Assistance Policy Division, Office of Policy in the Office of Acquisition Management at (202) 287-1747 or at richard.bonnell@hq.doe.gov. For NNSA, contact NNSA at (505) 845-4337. For conference spending questions, contact Jason Taylor at (202) 287-1560 or at jason.taylor@hq.doe.gov.

Who is the intended audience?

Department of Energy (DOE) and National Nuclear Security Administration (NNSA) Contracting Officers.

What is the purpose?

The purpose of this FAL is to provide information and guidance regarding the Department of Energy's (DOE or Department) implementation of Division D, Title III and Title V, and Division E, Title VII of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2016 Act). The Congressional Notification requirements of the Act will be addressed in a separate Acquisition Letter/Financial Assistance Letter.

What types of actions are affected by this FAL?

This FAL applies to all DOE and NNSA funding opportunity announcements and financial assistance actions **funded with fiscal year 2016 appropriated funds (See Section 306, 307, 739, 743, 744, 745 and 746 for additional Acts applicability)**. For funding opportunity announcements and financial assistance actions funded in whole or in part with previous fiscal year funds or other Act funds and guidance is not provided in this FAL, please refer to the corresponding FAL for appropriate guidance. For example, if an award is made with fiscal year 2013 appropriated funds please see FAL 2013-04 for appropriate guidance.

NOTE:

- Sections 301(b), (c), (d), and (g) of the 2016 Act which contain requirements for advance notification to Congress for certain financial assistance actions funded with this Act are addressed in a separate Financial Assistance Letter (**FAL 2016-02**).

What guidance is included in this FAL?

Consolidated Appropriations Act, 2016

- I. Section 301(a) Unfunded Requests for Proposals**
- II. Section 301(c) Multiyear Award Funding for DOE—Energy Programs**
- III. Section 306 Multiyear Award Funding for DOE—Energy Programs—Science**
- IV. Section 307 Prohibition on Awards to the Russian Federation**
- V. Section 501 Lobbying Restrictions**
- VI. Section 724 Federal Funds Source Information**
- VII. Section 739 Reporting on Conference Spending**
- VIII. Section 743 Confidentiality Agreements Prohibiting Whistleblower Activities**
- IX. Section 744 Prohibition on Funding for Certain Nondisclosure Agreements**
- X. Section 745 Unpaid Federal Tax Liability**
- XI. Section 746 Felony Criminal Violations**

I. Section 301(a) UNFUNDED REQUESTS FOR PROPOSALS

What is the law?

No appropriation, funds, or authority made available by this title for the Department of Energy shall be used to initiate or resume any program, project, or activity or to prepare or initiate Requests For Proposals or similar arrangements (including Requests for Quotations, Requests for Information, and Funding Opportunity Announcements) for a program, project, or activity if the program, project, or activity has not been funded by Congress.

What is the scope of this requirement?

Section 301(a) of Division D of the 2016 Act requires that funds appropriated by the 2016 Act not be used to prepare, initiate, or publicize Requests for Information (RFI) and Funding Opportunity Announcements (FOA) for any program, project, or activity if the program, project, or activity has not been funded by Congress.

What procedures need to be followed to implement this requirement?

Before preparing, initiating, or publicizing RFIs or FOAs in support of a program, project, or activity, the Contracting Officer shall work with the program office and the program

budget office officials to ensure the program, project, or activity has been funded by Congress.

II. Section 301(c) MULTIYEAR AWARD FUNDING FOR DOE—ENERGY PROGRAMS

What is the law?

The Department of Energy may not, with respect to any program, project, or activity that uses budget authority made available in this title under the heading “Department of Energy—Energy Programs”, enter into a multiyear contract, award a multiyear grant, or enter into a multiyear cooperative agreement unless—

- (1) The contract, grant, or cooperative agreement is funded for the full period of performance as anticipated at the time of award; or
- (2) The contract, grant, or cooperative agreement includes a clause conditioning the Federal Government’s obligation on the availability of future year budget authority and the Secretary notifies the Committees on Appropriations of both Houses of Congress at least 3 days in advance.

What is the scope of this requirement?

Section 301(c) of Division D of the 2016 Act requires that multiyear contracts, grants, and cooperative agreements, awarded with funds appropriated by the 2016 Act under the heading “Department of Energy—Energy Programs” must either be: A) funded for the full period of performance as anticipated at the time of award; **or** B) include a clause in the Federal award conditioning the Federal Government’s obligation on the availability of future year budget authority **and** the Secretary must notify the Committees on Appropriations of both Houses of Congress at least 3 days in advance of the award.

What procedures need to be followed to implement this requirement?

Contracting Officers awarding multiyear contracts, grants, or cooperative agreements with funds appropriated by the 2016 Act under the heading “Department of Energy—Energy Programs” must:

- A. ensure that the funds for the full period of performance, as anticipated at the time of award, are available prior to award and obligated at award, or
- B. include the appropriate Terms and Conditions in the FOA and Award stating that the federal government’s obligation is contingent upon the availability of funds appropriated by Congress for the purpose of this program and the availability of future-year budget authority, and provide notification to the Committees on Appropriations of both Houses of Congress at least 3 days in advance in accordance with the 301/311 Congressional Notifications AL/FAL.

FOA terms with this language include: “Amount New Awards”, “Amount Multiple Awards”, and “Amount Appropriation Dependent” in Section 2 Part B Estimated Funding; “Funding Restrictions (December 2014)” in Section 4 Part G Funding Restrictions. Award terms with this language include: “Incremental Funding and Maximum Obligation – Different Budget Period and Project Period”, “Incremental Funding and Maximum Obligation – Coextensive Budget Period and Project Period”, and “Funding of Budget Periods”.

Congressional Notifications must be followed in accordance with the 301/311 Congressional Notification AL/FAL (AL 2016-02 /FAL 2016-02)

“Multiyear grant or multiyear cooperative agreement award” or “Multi-year grant or multi-year cooperative agreement award” means a new or renewal award with a project period greater than 12 months, excluding continuation amendments.

III. Section 306 MULTIYEAR AWARD FUNDING FOR DOE—ENERGY PROGRAMS—SCIENCE

What is the law?

Notwithstanding section 301(c) of this Act, none of the funds made available under the heading “Department of Energy—Energy Programs—Science” in this or any subsequent Energy and Water Development and Related Agencies appropriations Act for any fiscal year may be used for a multiyear contract, grant, cooperative agreement, or Other Transaction (OT) Agreement of \$1,000,000 or less unless the contract, grant, cooperative agreement, or Other Transaction Agreement is funded for the full period of performance as anticipated at the time of award.

What is the scope of this requirement?

Section 306 of Division D of the 2016 Act requires that multiyear contracts, grants, cooperative agreements, or Other Transaction Agreements of \$1,000,000 or less awarded **with funds appropriated by the 2016 Act or any subsequent Energy and Water Development and Related Agencies appropriations Act for any fiscal year** under the heading “Department of Energy—Energy Programs—Science” must be funded for the full period of performance as anticipated at the time of award.

What procedures need to be followed to implement this requirement?

Contracting Officers awarding multiyear contracts, grants, cooperative agreements, or Other Transaction Agreements of \$1,000,000 or less **with funds appropriated by the 2016 Act or any subsequent Energy and Water Development and Related Agencies appropriations Act for any fiscal year** under the heading “Department of Energy—Energy Programs—Science” must ensure that the funds for the full period of performance, as anticipated at the time of award, are available prior to award and obligated at award.

“Multiyear grant or multiyear cooperative agreement award” or “Multi-year grant or multi-year cooperative agreement award” means a new or renewal award with a project period greater than 12 months, excluding continuation amendments.

IV. Section 307 PROHIBITION ON AWARDS TO THE RUSSIAN FEDERATION

What is the law?

(a) None of the funds made available in this or any prior Act under the heading “Defense Nuclear Nonproliferation” may be made available to enter into new contracts with, or new agreements for Federal assistance to, the Russian Federation.

(b) The Secretary of Energy may waive the prohibition in subsection (a) if the Secretary determines that such activity is in the national security interests of the United States. This waiver authority may not be delegated.

(c) A waiver under subsection (b) shall not be effective until 15 days after the date on which the Secretary submits to the Committees on Appropriations of both Houses of Congress, in classified form if necessary, a report on the justification for the waiver.

What is the scope of this requirement?

Section 307 of Division D of the 2016 Act requires that none of the funds **made available in this or any prior Act** under the heading “Defense Nuclear Nonproliferation” be made available to enter into new contracts with, or new agreements for Federal assistance to, the Russian Federation unless the Secretary of Energy waives the prohibition.

What procedures need to be followed to implement this requirement?

Contracting Officers **may not make any new awards with funds made available in this or any prior Act** under the heading “Defense Nuclear Nonproliferation” to the Russian Federation. Contracting Officers **may not provide any additional funding to previous awards made to the Russian Federation with funds made available in this or any prior Act** under the heading “Defense Nuclear Nonproliferation”.

The Secretary of Energy may waive this prohibition if the Secretary determines that such activity is in the national security interests of the United States. This waiver authority may not be delegated. The waiver shall not be effective until 15 days after the date on which the Secretary submits to the Committees on Appropriations of both Houses of Congress, in classified form if necessary, a report on the justification for the waiver.

V. Section 501 LOBBYING RESTRICTIONS

What is the law?

None of the funds appropriated by this Act may be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before Congress, other than to communicate to Members of Congress as described in 18 U.S.C. § 1913.

What is the scope of this requirement?

Section 501 of Division D of the 2016 Act applies to all solicitations, funding opportunity announcements, and awards of DOE financial assistance to which funds appropriated under the 2016 Act are obligated.

What procedures need to be followed to implement this requirement?

Contracting Officers shall ensure that the standard award term entitled “**LOBBYING RESTRICTIONS (March 2012)**” is incorporated into all solicitations, FOAs, and awards of financial assistance that use funds appropriated by the 2016 Act.

VI. Section 724 FEDERAL FUNDS SOURCE INFORMATION

What is the law?

Any request for proposals, solicitation, grant application, form, notification, press release, or other publications involving the distribution of Federal funds shall comply with any relevant requirements in part 200 of title 2, Code of Federal Regulations: *Provided*, That this section shall apply to direct payments, formula funds, and grants received by a State receiving Federal funds.

What is the scope of this requirement?

Section 724 of Division E of the 2016 Act requires that Federal forms used to distribute Federal funds to a State must comply with the requirements of 2 CFR 200, as implemented by 2 CFR 910.

What procedures need to be followed to implement this requirement?

FOAs, grant applications, Federal forms, notifications, DOE press releases, or other DOE publications involving the distribution of Federal funds to a State through direct payment, formula funds, or grants, that are obligated with funds appropriated by the 2016 Act must comply with the requirements of 2 CFR 200, as implemented by 2 CFR 910.

VII. Section 739 REPORTING ON CONFERENCE SPENDING

What is the law?

(a) The head of any Executive branch department, agency, board, commission, or office funded by this or any other appropriations Act shall submit annual reports to the Inspector General or senior ethics official for any entity without an Inspector General, regarding the costs and contracting procedures related to each conference held by any such department, agency, board, commission, or office during fiscal year 2016 for which the cost to the United States Government was more than \$100,000.

(b) Each report submitted shall include, for each conference described in subsection (a) held during the applicable period—

- (1) A description of its purpose;
- (2) The number of participants attending;
- (3) A detailed statement of the costs to the United States Government, including—
 - (A) The cost of any food or beverages;
 - (B) The cost of any audio-visual services;
 - (C) The cost of employee or contractor travel to and from the conference; and
 - (D) A discussion of the methodology used to determine which costs relate to the conference; and
- (4) A description of the contracting procedures used including—
 - (A) Whether contracts were awarded on a competitive basis; and
 - (B) A discussion of any cost comparison conducted by the departmental component or office in evaluating potential contractors for the conference.

(c) Within 15 days of the date of a conference held by any Executive branch department, agency, board, commission, or office funded by this or any other appropriations Act during fiscal year 2016 for which the cost to the United States Government was more than \$20,000, the head of any such department, agency, board, commission, or office shall notify the Inspector General or senior ethics official for any entity without an Inspector General, of the date, location, and number of employees attending such conference.

(d) A grant or contract funded by amounts appropriated by this or any other appropriations Act may not be used for the purpose of defraying the costs of a conference described in subsection (c) that is not directly and programmatically related to the purpose for which the grant or contract was awarded, such as a conference held in connection with planning, training, assessment, review, or other routine purposes related to a project funded by the grant or contract.

(e) None of the funds made available in this or any other appropriations Act may be used for travel and conference activities that are not in compliance with Office of Management and

Budget Memorandum M-12-12 dated May 11, 2012 or any subsequent revisions to that memorandum.

What is the scope of this requirement?

Section 739 of Division E of the 2016 Act applies to all solicitations, FOAs, and awards of financial assistance or contracts funded by the 2016 Act, or any other appropriations act.

What procedures need to be followed to implement this requirement?

Contracting Officers shall ensure that the “**Conference Spending (February 2015)**” term is incorporated into all new financial assistance solicitations and FOAs that will result in financial assistance awards as well as in all new financial assistance awards that are obligated with funds appropriated by the 2016 Act or any other appropriations act. Contracting Officers shall also ensure that financial assistance awards are not made or amended to defray costs to DOE and/or circumvent the requirements for approval of DOE conferences.

VIII. Section 743 CONFIDENTIALITY AGREEMENTS PROHIBITING WHISTLEBLOWER ACTIVITIES

What is the law?

(a) None of the funds appropriated or otherwise made available by this or any other Act may be available for a contract, grant, or cooperative agreement with an entity that requires employees or contractors of such entity seeking to report fraud, waste, or abuse to sign internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or contractors from lawfully reporting such waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information.

(b) The limitation in subsection (a) shall not contravene requirements applicable to Standard Form 312, Form 4414, or any other form issued by a Federal department or agency governing the nondisclosure of classified information.

What is the scope of this requirement?

Section 743 of Division D of the 2016 Act applies to all applicants for and recipients of new DOE grant, cooperative agreement, and other transaction agreements, and any current, renewal or continuation awards **that are funded by the 2016 Act or funds from previous Acts**. This requirement includes no dollar value threshold and does flow down to subawardees (e.g., subrecipients, subgrantees, subcontractors).

SF312 is the Classified Information Nondisclosure Agreement.

What procedures need to be followed to implement this requirement?

Contracting Officers shall ensure that the “**Nondisclosure and Confidentiality Agreements Representations (June 2015)**” is incorporated into all new financial assistance solicitations and FOAs that will result in grant, cooperative agreement, or OT awards that are obligated with funds appropriated by the 2016 Act or any other Acts.

The Contracting Officer shall ensure that the awarded entity’s representation is current at award by including the “**Nondisclosure and Confidentiality Agreements Assurances (June 2015)**” in new, current and renewal/continuation grant, cooperative agreement, and OT awards **that are obligated with funds appropriated by the 2016 Act or any other Acts**. To ensure that Recipients of previously awarded grants, cooperative agreements or OT awards do not prohibit or otherwise restrict their employees or contactors from lawfully reporting waste, fraud, or abuse, Contracting Officers shall include the “**Nondisclosure and Confidentiality Agreements Assurances (June 2015)**” **in the next award modification that is executed and funded after enactment of this Act with funds from this Act or any other Act**.

IX. Section 744 PROHIBITION ON FUNDING FOR CERTAIN NONDISCLOSURE AGREEMENTS**What is the law?**

(a) No funds appropriated in this or any other Act may be used to implement or enforce the agreements in Standard Forms 312 and 4414 of the Government or any other nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain the following provisions: “These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.”: *Provided*, That notwithstanding the preceding provision of this section, a nondisclosure policy form or agreement that is to be executed by a person connected with the conduct of an intelligence or intelligence-related activity, other than an employee or officer of the United States Government, may contain provisions appropriate to the particular activity for which such document is to be used. Such form or agreement shall, at a minimum, require that the person will not disclose any classified information received in the course of such activity unless specifically authorized to do so by the United States Government. Such nondisclosure forms shall also make it clear that they do not bar disclosures to Congress, or to an authorized official of an executive agency or the Department of Justice, that are essential to reporting a substantial violation of law.

(b) A nondisclosure agreement may continue to be implemented and enforced notwithstanding subsection (a) if it complies with the requirements for such agreement that were in effect when the agreement was entered into.

(c) No funds appropriated in this or any other Act may be used to implement or enforce any agreement entered into during fiscal year 2014 which does not contain substantially similar language to that required in subsection (a).

What is the scope of this requirement?

Section 744 of Division E of the 2016 Act applies to non-Federal nondisclosure policies, forms, or agreements in use while performing under a Federal award (grant, cooperative agreement or other transaction).

SF312 is the Classified Information Nondisclosure Agreement.

What procedures need to be followed to implement this requirement?

Contracting Officers shall ensure that the “**Nondisclosure and Confidentiality Agreements Representations (June 2015)**” is incorporated into all new financial assistance solicitations and FOAs that will result in grant, cooperative agreement, or OT awards that are obligated with funds appropriated by the 2016 Act or any other Acts.

The Contracting Officer shall ensure that the awarded entity’s representation is current at award by including the “**Nondisclosure and Confidentiality Agreements Assurances (June 2015)**” in new, current and renewal/continuation grant, cooperative agreement, and OT awards that are obligated with funds appropriated by the 2016 Act or any other Acts. To ensure that Recipients of previously awarded grants, cooperative agreements or OT awards do not use funds appropriated in this or any other Act to implement or enforce any nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain the appropriate provisions, Contracting Officers shall include the “**Nondisclosure and Confidentiality Agreements Assurances (June 2015)**” in the next award modification that is executed and funded after enactment of this Act with funds from this Act or any other Act.

X. Section 745 UNPAID FEDERAL TAX LIABILITY

What is the law?

None of the funds made available by this or any other Act may be used to enter into a contract, memorandum of understanding, or cooperative agreement with, make a grant to, or provide a loan or loan guarantee to, any corporation that has any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability, where the awarding agency is aware of the unpaid tax liability, unless a Federal agency has considered suspension or debarment of the corporation and

has made a determination that this further action is not necessary to protect the interests of the Government.

What is the scope of this requirement?

Section 745 of Division E of the 2016 Act applies to all new DOE grant, cooperative agreement, loan, and loan guarantee awards, and renewal or continuation awards to corporations that are funded by the 2016 Act or any other Act. This requirement includes no dollar value threshold and does not flow down to subawardees (e.g., subrecipients, subgrantees, subcontractors).

What procedures need to be followed to implement this requirement?

Contracting Officers shall ensure that the “Corporate Felony Conviction and Federal Tax Liability Representations (March 2014)” is incorporated into all new financial assistance solicitations and FOAs that will result in grant and/or cooperative agreement awards that are obligated with funds appropriated by the 2016 Act or any other Act.

The Contracting Officer shall ensure that the corporation’s representation is current at award by including the “Corporate Felony Conviction and Federal Tax Liability Assurances (March 2014)” in new and renewal/continuation awards to corporations that are obligated with funds appropriated by the 2016 Act or any other Act.

XI. Section 746 FELONY CRIMINAL VIOLATIONS

What is the law?

None of the funds made available by this or any other Act may be used to enter into a contract, memorandum of understanding, or cooperative agreement with, make a grant to, or provide a loan or loan guarantee to, any corporation that was convicted of a felony criminal violation under any Federal law within the preceding 24 months, where the awarding agency is aware of the conviction, unless a Federal agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

What is the scope of this requirement?

Section 746 of Division E of the 2016 Act applies to all new DOE grant, cooperative agreement, loan, and loan guarantee awards, and renewal or continuation awards to corporations that are funded by the 2016 Act or any other Act. This requirement includes no dollar value threshold and does not flow down to subawardees (e.g., subrecipients, subgrantees, subcontractors).

What procedures need to be followed to implement this requirement?

Contracting Officers shall ensure that the “Corporate Felony Conviction and Federal Tax Liability Representations (March 2014)” is incorporated into all new financial assistance

solicitations and FOAs that will result in grant and/or cooperative agreement awards that are obligated with funds appropriated by the 2016 Act or any other Act.

The Contracting Officer shall ensure that the corporation's representation is current at award by including the "**Corporate Felony Conviction and Federal Tax Liability Assurances (March 2014)**" in new and renewal/continuation awards **to corporations** that are obligated with funds appropriated by the 2016 Act or any other Act.

FOR SECTIONS 745 and 746:

A Corporation includes any entity that has filed articles of incorporation in any of the 50 states, the District of Columbia, or the various territories of the United States [but not foreign corporations]. It includes both for-profit and non-profit organizations.

If the applicant (corporation) makes an affirmative response to the representation (it is a corporation with felony convictions in the past 24 months and/or is a corporation with an unpaid Federal tax liability), the awarding official (e.g., the contracting officer or grants officer) shall consult with the DOE Suspension and Debarment Official (SDO) to determine what, if any, steps have been taken by that official, or by another agency's SDO. The awarding official shall not make an award to the corporation that has responded affirmatively unless and until the SDO has: (1) considered suspension or debarment of the corporation and (2) has made a written determination that further action is not necessary to protect the interests of the government. The agency may determine whether it is appropriate to proceed with making awards to other applicants prior to receiving a definitive resolution from the SDO. The SDO, upon being informed by the awarding official of an affirmative response in a representation, could review any determination that has already been made, and independently adopt it as appropriate, without having to conduct a new investigation. If the funds are coming from another agency's appropriations, the awarding official must confer with the other agency which must consider suspension or debarment and conclude that suspension or debarment is not necessary before the awarding official can move forward.

The awarding official should notify and confer with the SDO to discuss how much time the SDO will need to make a determination. If the agency determines that the award date cannot be deferred for the period required for the SDO to make the debarment or suspension determination, the applicant shall be found ineligible for award based on the statute's prohibition of an agency entering into an award with that entity until a determination has been made. The awarding official may make an award to the next applicant that is in line to receive an award. An agency's decision to make an award to the applicant that is next in line to receive an award does not lessen the agency's obligation to continue working to make a determination regarding whether it is necessary to suspend or debar the initial applicant in order to protect the government's interest.

Note: A determination of ineligibility for award based on a statutory prohibition on the use of appropriated funds is not the same as a statutory debarment. In the case of a statutory debarment, the corporation would be automatically debarred and listed on EPLS; here, by contrast, a corporation would not be listed on EPLS unless the SDO took action to suspend or

debar the corporation in accordance with the due process requirements of FAR Subpart 9.4 or 2 CFR 180. In addition, a determination of ineligibility is not the same as a non-responsibility determination by a contracting officer under FAR 9.104. In the former case, the contracting officer is making a determination that the agency lacks funds to make the award in light of the statutory restriction. In the latter case, the contracting officer would be determining that the offeror lacks the requisite business integrity and ethics – or other standards which a recipient must possess, such as financial capability and a satisfactory performance record – to perform under an award from the government notwithstanding the availability of funds.